LESLIE E. DEVANEY
ANITA M. NOONE
LESLIE J. GIRARD
SUSAN M. HEATH
GAEL B. STRACK
ASSISTANT CITY ATTORNEYS

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

Casey Gwinn
CITY ATTORNEY

CIVIL DIVISION
1200 THIRD AVENUE, SUITE 1200
SAN DIEGO, CALIFORNIA 92101-4194
TELEPHONE (619) 533-5800
FAX (619) 533-5847

January 26, 1998

REPORT TO THE COMMITTEE
ON LAND USE AND HOUSING

PROPOSED COUNCIL POLICY 600-41 -
INDEMNIFICATION FOR DEVELOPMENT APPROVALS

Introduction

Over the last year, my office has been reviewing the City's exposure to attorney fees and other costs of litigation associated with approving controversial land use projects. The threat to the taxpayers from legal challenges to land use decisions is real and increasing. The complexity of the law in these areas and the use of the California Environmental Quality Act (CEQA) to attack and oppose unpopular projects by seeking delay contribute to large exposure for the City to litigation costs and attorney fees. Scarce budget resources make it more important than ever to reduce the City's exposure to such costs and I believe that the taxpayers' liability could be reduced by Council adoption of a policy requiring developers to indemnify the City under certain circumstances. I also believe that indemnification can enhance the City's pro-business philosophy by permitting projects to move forward knowing that the project proponents stand willing and able to assist the City in defending development decisions.

The adoption of a policy requiring third-party indemnification from developers is not a material change or a shifting of burden for developers with respect to the risks and costs associated with development. Historically, developers have assumed the political and legal risks and costs associated with processing a project from conception to build out. Developers typically pay the City for all costs associated with accepting and processing their development applications. This includes the cost of City staff time devoted to processing the project and the developer's own consultant's time and expense in preparing required documentation for City review. There are also costs incurred by developers in connection with making presentations and soliciting recommendations from community planning groups. Additional costs are associated with multiple public hearings often required by law or administrative appeals of the project. This proposed policy simply and logically extends the burden of risk for the developer to include any litigation filed by a third party against the City within that window of vulnerability after City Council

approval of a project and prior to the pulling of building permits. For most projects, that window of vulnerability coincides with a statute of limitations which is relatively short, 30, 35 or 180 days.

In researching this issue, I have learned that approximately fifty percent of jurisdictions in Southern California are requiring third-party indemnification from developers. The County of San Diego requires this type of indemnification in connection with all subdivisions and discretionary land use permits. The City of Chula Vista requires developers to execute indemnification agreements for all discretionary land use actions at the time development applications are submitted. This proposal is more modest in that it applies only to larger scale controversial projects. Moreover, application of the policy as proposed affords the project applicant the opportunity through the discretionary process to request deletion of the indemnification condition. The decision-maker could delete it if circumstances warrant an exception or waiver of the policy.

Attached to this Report for your consideration is a draft Council Policy directing the City Manager to seek indemnification from developers for certain types of development approvals, in particular:

1. Any discretionary land use entitlement action in the Coastal Zone, except when the permit or entitlement sought is limited to development proposed on a single lot where no more than one dwelling unit is permitted by the zoning regulations.

2. Any discretionary land use entitlement action in the Future Urbanizing Area.

3. Any Conditional Use Permit.

4. Any private project requiring certification of an Environmental Impact Report.

The balance of this Report provides the legal authority to support such a policy.

Legal Authority for Adoption of an Indemnification Policy

Under its police power, the City is empowered to protect the public health, safety and welfare of its residents within the constraints of the California Constitution and statutory law. Cal. Const. art. XI, §§ 7 and 5. In exercising such power, the City may impose reasonable conditions upon development when such conditions are based on the general objectives of the General Plan and the ordinances, regulations, and policies which implement that plan. See generally Cal. Gov't Code, tit. 7, §§ 65800 to 65912. The power to impose a condition of approval need not be expressed by the enactment of an ordinance or regulation if it furthers the objectives of the General Plan and achieves the goals of the City. Soderling v. City of Santa Monica, 142 Cal. App. 3d 501, 506 (1983). The purpose of the City's General Plan is to implement "goals and policies relating to growth and development of San Diego." Progress Guide and General Plan at 13. The City's general zoning authority may be exercised whenever

"public necessity, convenience or general welfare, or good zoning practice justifies such action." San Diego Municipal Code (SDMC) § 101.0203.

One of the caveats to exercising general police power is that a city may not obtain indemnification for its own negligence as a condition of rendering an essential public service. Tunkl v. Regents of California, 60 Cal. 2d 92, 98 (1963). However, when no essential public service is involved, or there is no statutory prohibition, the city may provide for such indemnification. No Oil Inc. v. City of Los Angeles, 196 Cal. App. 3d 223 (1987).

In No Oil, the Court upheld the imposition of an indemnification condition on the establishment of three oil drilling districts and the designation of a drill site. The Court found:

> [T]he indemnity agreement . . . does not preclude injured members of the public from holding City liable for its acts or omissions. Instead, the indemnity agreement merely provides that in such a situation, Occidental [the applicant] will defend, indemnify, and hold City harmless against such damages. The indemnity agreement in the case at bench is not within the class of contracts condemned by the Tunkl decision.

Id. at 252 (citation omitted). The agreement in No Oil was not a release from liability for negligence of the character found to be invalid and contrary to public policy in Tunkl. Here, by requiring indemnification from developers in certain circumstances, the City, as in No Oil, would not be seeking a release from liability for negligence, but rather, would be seeking to have the applicant for an entitlement defend, indemnify, and hold the City harmless for the issuance of the permit.

State statutes have been interpreted to allow the City to seek contractual indemnification in the course of approving development. Specifically, Civil Code section 2782.1 provides:

> Nothing contained in Section 2782 shall prevent a contractor responsible for the performance of a construction contract, as defined in Section 2783, from indemnifying fully a person, firm, corporation, state or other agency for whose account the construction contract is not being performed but who, as an accommodation, enters into an agreement with the contractor permitting such contractor to enter upon or adjacent to its property for the purpose of performing such construction contract for others.

Relying on this statutory provision, the Court in No Oil also found that "the indemnity agreement [at issue in the No Oil case] constitutes a 'construction contract' with a public agency as that term is defined by Civil Code Section 2783 [and therefore] . . . the indemnity agreement

falls within the exception stated in Civil Code Section 2782.1." 196 Cal. App. 3d at 253. Along these lines, it is common for the City to obtain indemnification from developers through contractual agreements executed in connection with private improvements proposed upon or affecting areas of public right-of-way. See, e.g., SDMC § 62.0302 relating to Encroachment Removal Agreements. Additionally, the Subdivision Map Act specifically provides that an indemnification condition may be included as a condition of map approval. Cal. Gov't Code § 66474.9.

In our review of this issue, we have learned that a number of other local government entities within the state routinely require indemnification as a condition of both map approvals and discretionary permit approvals, notably the counties of San Diego, Santa Barbara, Kern, Ventura, and San Bernardino. The City Council and Planning Commission have also required such a condition in connection with approval of discretionary permits on numerous past occasions, when circumstances warranted its inclusion.

For the reasons set forth in the attached proposed Council Policy and based on the legal authority cited above, I recommend that the Council consider a policy to include an indemnification condition as a matter of course for certain categories of development projects. Establishing such a policy will serve the dual purpose of reducing the City's potential exposure to attorney fees and to the high costs of litigation, while providing greater certainty in the development process for landowners and developers.

Respectfully submitted,

CASEY GWINN
City Attorney

RAD:lc:004x600(043.1)
Attachment
RC-98-2
C:\dmautop\temp\15.wpd